No. 01-949

JAN 24

In The

Supreme Court Of The United States

FRIENDS OF RICHARDS-GEBAUR AIRPORT,

Petitioner,

v.

FEDERAL AVIATION ADMINISTRATION, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF OF RESPONDENT AIRCRAFT OWNERS AND PILOTS ASSOCIATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

LAW OFFICES OF YODICE
ASSOCIATES
KATHLEEN A. YODICE
Counsel of Record
500 E Street, S.W., Suite 240
Washington, D.C., 20024
(202) 863-1000
(202) 863-1001 (facsimile)
Counsel for Respondent, Aircraft Owners and Pilots Association

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Supreme Court of the United States, the undersigned counsel for the Aircraft Owners and Pilots Association (AOPA) hereby certifies that there exists no parent company to AOPA, and no publicly held company owns 10% or more of AOPA's stock. AOPA is a national, non-profit association of more than 375,000 members dedicated primarily to issues related to general aviation.

Dated: January 24, 2002

Respectfully Submitted,

Law Offices of Yodice Associates
Kathleen A. Yodice
500 E Street, S.W., Suite 240
Washington, D.C. 20024
(202) 863-1000
Counsel for Respondent, Aircraft Owners and Pilots Association

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ARGUMENT

THE EIGHTH CIRCUIT DEVIATED FROM LAW AND PRECEDENT IN AFFIRMING THE FAA'S DECISION TO RELEASE A CITY FROM ITS FEDERAL OBLIGATIONS TO MAINTAIN AN AIRPORT AS AN AIRPORT

The Eighth Circuit's decision is in conflict with Supreme Court decisions and is contrary to other federal circuit decisions, including its own. This precedent opens the way for administrative agencies to abuse the great, but not unfettered, power and discretion recognized by courts in reviewing administrative interpretations of statutory schemes.

In deciding *Friends of Richards-Gebaur v. FAA*, 251 F.3d 1178, 1195 (8th Cir. 2001), the Eighth Circuit misapplied the well-established principles of law articulated by the Supreme Court in cases beginning with *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), through the most recent case of *United States v. Mead Corp.*, 533 U.S. ____, 121 S.Ct. 2164 (2001). As mandated by *Skidmore* and its progeny, the court was required to apply the unambiguous language of Congress to the actions of the FAA. Failing to do so, the Eighth Circuit erroneously gave deference to an administrative agency's statutory interpretation by relying on an FAA Order that exists only as an internal guideline, not adopted in accordance with formal rule-making procedures. As such, it is only due respect, and only to the extent the Order has the power to persuade, under *Christensen v. Harris County*, 529 U.S. 576 (2000), and *Skidmore*. Finally, the Eighth Circuit gave the FAA interpretation persuasive power despite the FAA failing to demonstrate a discernible path between its standard in Order 5190.6A and the standard in 49 U.S.C. § 47153. Because of this failure, the FAA's interpretative guidance does not hold any power to persuade and thus

does not warrant respect, much less deference. By failing to apply and follow the clear intent of Congress, the Eighth Circuit granted the FAA's Order unwarranted deference. By overlooking the plain language of the statute and then inappropriately according an administrative order a level of deference akin to *Chevron*, the Eighth Circuit has misapplied the law that has been defined and refined by the Supreme Court as it applies to administrative agency decisions.

A. The Legal Standard

The issue of how much deference is due administrative regulations, rulings, interpretations, and orders has developed through a series of cases before the Supreme Court. The Court has consistently held that when a statute unequivocally expresses Congressional intent, deference does not apply to administrative interpretations of that statute. *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 842 (1984). "If the intent of Congress is clear, that is the end of the matter; for the Court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* Only when "the statute is silent or ambiguous with respect to the specific issue" does the reviewing court then turn to "whether the agency's answer [to ambiguity or silence in the statutory scheme] is based on a permissible construction of the statute." *Id.* at 843. If the agency's answer is a permissible construction of statute, only then is deference due the agency's interpretation. *Id.*

Chevron also calls for "considerable weight" to be given to an agency's interpretation of a statutory scheme it is to administer when that statutory scheme creates a conflict in policies. *Id.* at 844. If the interpretation is a "reasonable accommodation of [the] conflicting policies," then the interpretation should stand unless it appears from the statute or legislative history that Congress would not

have approved of the agency's position. *Id.* at 845. *See also Christensen v. Harris County*, 529 U.S. at 586 (2000) (*Chevron* requires deference when an agency's regulation is "a reasonable interpretation of an ambiguous statute").

This Court most recently addressed *Chevron* deference in *United States v. Mead Corp.*, 533 U.S. ___, 121 S.Ct. 2164 (2001). *Mead* explains that *Chevron* deference is due only when Congress delegated an agency the general authority to make rules carrying the force of law. Further, deference is due only when those interpretations for which deference is sought were promulgated under that authority. *Id.* at 2171. This delegation of authority can be in the form of deliberate silence, an express delegation, ambiguity in the statutory scheme, or an explicit gap in the legislation; all are construed as an express delegation to explain a particular statutory provision by regulation. *Id.* Further, delegation may come when Congress implicitly intends for an "agency to be able to speak with the force of law" but only when it "address[es] ambiguity in the statute or fills a space in the enacted law." *Id.* at 2172. Only "[w]hen circumstances implying such an expectation exist, a reviewing court has no business rejecting an agency's exercise of its generally conferred authority to resolve a particular statutory ambiguity simply because the agency's chosen resolution seems unwise" and the reviewing court must "accept the agency's position if Congress has not previously spoken to the point at issue and the agency's interpretation is reasonable." *Id.* The hallmark "that Congress contemplates administrative action with the effect of law [is] when it provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force." *Id.* But where there is no congressional delegation of such power, the agency guideline is not owed *Chevron*-style deference. *Id.* In other words, where Congress did not provide for formal procedures for issuing guidelines,

and where interpretive authority is questionable, *Chevron*-style deference is inapplicable. *Id.* See *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 257 (1991); *Christensen v. Harris Co.*, 529 U.S. at 596 (Breyer, J., dissenting).

Chevron and its progeny clearly demand that deference only apply in those situations where there is a delegation of authority to act with the force of law, either by express direction, by ambiguity, or by an explicit gap in the statutory scheme. When such delegation is made, the reviewing court must accept an agency's answer to silence or ambiguity in the statute if it "is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843. Thus, if "an agency's regulation contain[s] a reasonable interpretation of an ambiguous statute," the reviewing court must accept that interpretation. *Christensen*, 529 U.S. at 586. Therefore, there are only three instances where *Chevron*-style deference is inapplicable:

> (1) the statute is unambiguous, so there is no room for administrative interpretation; (2) no interpretation has been made by personnel of the agency responsible for administering the statute; or (3) the interpretation made by such personnel was not authoritative, in the sense that it does not represent the official position of the expert agency.

Id. at 589, FN * (Scalia, J., concurring). Further, "these [same] reasons preclude Skidmore deference as well." *Id.*

B. The Eighth Circuit's Decision

i. There is no ambiguity, express gap or silence, or express grant of power in either 49 U.S.C. § 47153 or 14 C.F.R. § 155.3 permitting the

FAA to interpret the standard for releasing airport obligations.

The Eighth Circuit conceded that *Chevron* is inapplicable to the instant case, yet it proceeded to apply a level of deference akin to *Chevron*-style deference. Further, the court made its concession on erroneous grounds. The court based its decision on the fact that FAA Order 5190.6A is not the product of formal adjudication and determined that the appropriate standard is one of respect to the extent the Order has the "power to persuade."

Chevron-style deference is inappropriate in this case, not because of the rule-making procedures engaged in by the FAA in creating Order 5190.6A, but rather because both the underlying statute and regulation are clear and unambiguous, leaving no gaps for the FAA to fill-in through interpretation. *See Mead*, 121 S.Ct. 2164; *Christensen*, 529 U.S. at 589, FN * (Scalia, J., concurring); *Chevron*, 467 U.S. 837.

In 49 U.S.C. § 47153, Congress unambiguously set the standard by which the FAA could release airports from terms under the Surplus Property Act. The FAA may waive a term if "the property no longer serves the purpose for which it was given." 49 U.S.C. § 47153(a)(1)(A). In the alternative, the FAA may waive a term if "the waiver will not prevent carrying out the purpose for which the gift was made *and* is *necessary* to advance the civil aviation interests of the United States." 49 U.S.C. § 47153(a)(1)(B) [emphasis added]. In waiving the terms under 49 U.S.C. § 47153(a)(1), the Secretary of Transportation "shall waive a term...on terms the Secretary considers *necessary* to protect or advance the civil aviation interests of the United States." 49 U.S.C. § 47153(a)(2) [emphasis added].

In promulgating regulations to enforce the statute, the FAA replicated the standard set forth in the statute

essentially verbatim. The Administrator may grant releases if "[t]he release will not prevent accomplishing the purpose for which the property was made subject to the terms, conditions, reservations, or restrictions, and is *necessary* to protect or advance the interests of the United States in civil aviation." 14 C.F.R. § 155.3(a)(2) [emphasis added]. The regulation further echoed § 47513 in stating that the statute "authorizes the Administrator to grant the releases subject to terms and conditions that he considers *necessary* to protect or advance the interests of the United States in civil aviation." 14 C.F.R. § 155.3(a) [emphasis added].

In FAA Order 5190.6A, however, the FAA uses a different standard than that delineated by Congress in the underlying statute and in its own underlying regulation. *See* FAA Order 5190.6A at 7-2.a., 7-8.a., 7-8.a.(1), 7-37.a.(3), 7-37.b.(2) (Resp't App. at 4, 5, 7). Under the Order, the FAA announced a general policy that "[a] total release, permitting the sale and disposal of real property...shall not be granted unless it can clearly be shown that the sale of such property *will benefit* civil aviation." *Id.* at 7-8.a. (emphasis added) (Resp't App. at 5). Further, this section, upon which both the FAA and the Eighth Circuit relied, provides that where the "property is no longer needed to directly support an airport purpose or activity...it may be released for sale or disposal upon a determination that such disposal *will produce an equal or greater benefit* (to the airport or another public airport) than the continued retention of the land." *Id.* at 7-8.a.(1) (emphasis added) (Resp't App. at 5). Explaining this provision, the Order continues that this type of "release has the effect of authorizing the conversion of a real property asset into another form of asset (cash or physical improvements) *which better serves* the purpose for which the real property was initially conveyed." *Id.* (emphasis added) (Resp't App. at 5-6). The Order continues by stating that one of the "pertinent factors" to be considered

in evaluating a request for release from airport obligations is "[t]he *net benefit* to be derived by civil aviation..." *Id.* at 7-37.a.(3) (emphasis added) (Resp't App. at 7).

This faulty standard was repeated in the Memorandum of Agreement (MOA) between the FAA and the City of Kansas City, dated July 14, 1998, under which the FAA released the surplus property (Richards-Gebaur Memorial Airport) from all covenants and restrictions on use under the authority of 49 U.S.C. §§ 47122(a), 47153, 49 C.F.R. § 18.31, and FAA Order 5190.6A. Throughout the MOA, the FAA referred to the release as an action that would "benefit civil aviation" or that would "result in a net benefit to aviation."

> ...
>
> WHERAS, the FAA may release property obligated under the Surplus Property Act and under grant agreements, pursuant to 49 U.S.C. § 47122 (a) and § 47153, 49 C.F.R. § 18.31, and FAA Order 5190.6A, upon the repayment or reinvestment of certain amounts and upon a finding by the FAA that the release would benefit civil aviation;
>
> WHEREAS, it is the longstanding and continuing policy of the FAA to enforce the obligation under the Surplus Property Act and under grant assurances to maintain obligated property as a public airport, unless the net effect of closure of the airport would be a benefit to aviation;
>
> ...
>
> WHEREAS, in consideration of the number of public-use general aviation airports in the Kansas City area; the fact that at least three of these airports are within convenient

> driving distance of the areas served by Richards-Gebaur Airport, Kansas City, operates two other airports serving the Kansas City area; the fact that the remaining value of Airport Improvement Program (AIP) investments in Richards-Gebaur recovered from the City may be reinvested in other general aviation capacity projects in the Kansas City area; the fact that the proposed redevelopment of the Property will produce substantial revenue for aviation development in the Kansas city airport system; and the fact that a significant part of this revenue stream will be committed to general aviation projects in the Kansas City airport system; the FAA finds that highly unusual circumstances exist that would support a finding that the release and closure of the Richards-Gebaur Airport would result in a net benefit to aviation;
>
> ...

(Memorandum of Agreement from FAA to City of Kansas City of July 14, 1998, at pp. 1, 3.)[1] *See also* Resp't App. at 8. Nowhere, in any document, did the FAA ever directly state or imply that a release from obligations and the subsequent closure of the Richards-Gebaur Memorial Airport was "necessary to protect or advance" civil aviation, as prescribed and demanded by both § 47153 and § 155.3.

In common colloquy, there is a vast difference between something that is "necessary" and something that merely acts to "benefit." The American Heritage Dictionary

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[1] The full text of the Memorandum of Agreement is available in the Record as Addendum 1 of the Brief of Petitioner Aircraft Owners and Pilots Association.

defines "benefit" as "something that promotes or enhances well-being; advantage...[t]o be helpful or useful to...[t]o gain advantage." *The American Heritage Dictionary* 171 (2d College Ed. 1982). "Necessary" is defined as "absolutely essential; indispensable," "[n]eeded to achieve a certain result or effect; requisite," or "unavoidably determined by prior conditions or circumstances; inevitable." *Id.* at 834.

On the face of § 47153 and Order 5190.6A, the two standards are at opposite ends of the spectrum. Under the plain meaning of the standard utilized by the FAA, the question asked was whether the release of the obligations and closure of the Airport would benefit civil aviation by providing *an equal or greater benefit* by funneling funds to other airports. Had it applied the plain meaning of the statutory standard, the question would have been whether civil aviation would be harmed by keeping the airport open and not funneling the money designated for the Richards-Gebaur Memorial Airport to other airports in the area. Nowhere in Order 5190.6A does the FAA create a discernible path from "necessary to advance or protect" to "benefit[ing] civil aviation." By implicitly doing so itself, the Eighth Circuit not only rejected the clarity of the standard set forth by Congress, but it afforded an inappropriate level of deference to the administrative interpretation and granted an administrative agency more leeway than the power Congress intended to confer.

ii. The Eighth Circuit inappropriately applied a deferential standard equivalent to *Chevron*.

Although the court's reasoning was faulty in considering whether *Chevron* was applicable in this instance, the court's ultimate conclusion was correct – *Chevron*-style deference is not appropriate in the instant case. Notwithstanding this conclusion, the court proceeded to apply a deferential standard synonymous with *Chevron*.

See Friends of Richards-Gebaur Airport v. F.A.A., 251 F.3d 1178, 1195 (8th Cir. 2001). The court found that "order [5190.6A] interprets the statutory and regulatory standard as satisfied so long as the release of the property 'can clearly be shown...[to] benefit civil aviation.'" *Id.* The court noted that the converse would be to "require the continued use of airport property in a manner that does not best serve the purpose of the original gift." *Id.* Concluding, the court held that the FAA "reasonably interpret[ed] the statute" when it determined "that a release providing a net benefit to aviation is 'necessary' to advance and protect civil aviation." *Id.* As the case law suggests, though, "there is no room for administrative interpretation" when Congress unambiguously set forth the appropriate standard in the underlying statute. *See Christensen*, 529 U.S. at 589, FN * (Scalia, J., concurring). Only where there is silence or ambiguity in the statute, or where Congress expressly delegated the authority to make rules with the force of law, shall a court consider an agency's interpretation of that statute. *Mead*, 121 S.Ct. 2171, *Christensen*, 529 U.S. 586, *Chevron*, 467 U.S. at 843.

Consequently, the Eighth Circuit's decision creates a precedent that enables administrative agencies to act beyond their expressly delegated powers and beyond their interpretative authority, as has been traditionally recognized in cases of statutory ambiguity or conflict in policy created by statute. That precedent permits an administrative agency to act in circumvention of the plain and unambiguous intent of Congress, ultimately leading to the erosion of the public's trust.

iii. The Eighth Circuit should not have given deference to the FAA's interpretation, but merely respect to the extent it had the power to persuade, because it was set forth in an internal order designed as internal guidance

> and not subject to notice-and-comment under formal rule-making.

Notwithstanding the unambiguous nature of both the statute and regulation underlying Order 5190.6A precluding the need for deference, the Eighth Circuit further erred in applying a *Chevron*-like deference to the FAA Order. The Order was not issued after undergoing formal adjudicatory procedure under the Administrative Procedure Act, or even informal rule-making under which the public may participate through notice and comment procedures.

Over 50 years ago, the Supreme Court set the standard for instances like the present: administrative rulings adopted not in accordance with formal rule-making procedures are not binding on courts. They are nevertheless due respect, but only to the extent they have the power to persuade. *Skidmore v. Swift*, 323 U.S. 134, 139, 140 (1944).

This seminal principle was recently affirmed in *Christensen* when this Court held that agency interpretations set forth in opinion letters, "like interpretations contained in policy statements, agency manuals, and enforcement guidelines" do not carry the force of law and thus "do not warrant *Chevron*-style deference". 529 U.S. at 587. *See also Mead*, 121 S.Ct. at 2175 ("'interpretations contained in policy statements, agency manuals, and enforcement guidelines'...are beyond *Chevron* pale"). Among those interpretations entitled to deference under *Chevron*, this Court noted that interpretations contained in regulations, *arrived at after undergoing formal rule making procedures*, should be deferred to. 529 U.S. at 587.

Further, the FAA was not delegated the authority to act with the force of law in interpreting 49 U.S.C. § 47153.

Where on the face of the statute, "the terms of the congressional delegation give no indication that Congress meant to delegate authority to [the agency to act]...with the force of law...", *Mead*, 121 S.Ct. at 2173-2174, the reviewing court "must continue to differentiate between *Chevron* and *Skidmore*." *Id.* at 2177. Where the administrative action is made without the force of law, the agency is at least entitled to "seek respect proportional to its 'power to persuade.'" *Id.* at 2175-2176.

iv. No respect, much less deference, is owed Order 5190.6A because the Order does not have the power to persuade.

In *Skidmore*, this Court recognized that an Administrator, by virtue of experience and knowledge, is "obliged to reach conclusions" so that he may properly enforce the law with which he is entrusted to administer. 323 U.S. at 138. Any rulings or interpretations that the Administrator makes in pursuit of this task are not binding on the courts if they are not made "as a result of hearing adversary proceedings in which he finds facts from evidence and reaches conclusions of law from findings of fact." *Id.* at 139. The Court did note, however, that any decisions by the Administrator would be made with more specialized experienced and information than a judge would have. *Id.* Despite the lack of formal rule-making, any policies, standards, rulings, and interpretations are entitled to respect. *Id.* at 140. The weight accorded will depend upon the particular action's power to persuade. *Id.* The power to persuade is based on "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements," as well as additional factors. *Id.*

Skidmore does not save the FAA Order for two reasons. First, in *Skidmore*, Congress left an express gap for the courts and for the Administrator to fill because it did not

"utilize the services of an administrative agency to find facts and to determine in the first instance whether particular cases fall within or without the Act." *Skidmore*, 323 U.S. at 137. Because there was an express gap, Congress intended the Administrator to act to fill that gap. Even though the Administrator's actions were not subject to formal rule-making, because such actions were intended by Congress, they were entitled to some respect so long as the Administrator explained his reasoning. As argued above, Congress left no gaps for the FAA to fill while legislating when an airport proprietor may be released from grant obligations under the Surplus Property Act. As such, Congress did not intend for the FAA to fill in any gaps with interpretations of § 47153.

Further, as Justice Scalia stated in his *Christensen* concurrence, there are only three situations in which *Chevron* deference is inapplicable, and those same three situations also work to bar *Skidmore* deference. *Christensen*, 529 U.S. at 589, FN * (Scalia, J., concurring). Because 49 U.S.C. § 47153, setting the standard under which grant obligations may be released, is not ambiguous, neither *Chevron* nor *Skidmore* apply.

Second, *Skidmore* calls for respect to the extent the agency's action has the power to persuade. 323 U.S. at 140. As argued above, the FAA did not provide any persuasive reasoning as to why providing a net benefit to civil aviation was anything other than a mere benefit as opposed to a necessity to protecting or advancing civil aviation. Nowhere in its Order did the FAA provide a line of reasoning connecting the two standards; they did not even state in the Order that the two standards, "net benefit" and "necessary," were used synonymously, as attempted by the National Park Service in *Sokol v. Kennedy, 210 f.3d 876 (8th Cir. 2000)*.

v. No deference is due FAA Order 5190.6A because 14 C.F.R. § 155.3 is unambiguous.

Just as there is no room for administrative interpretation when Congress unambiguously set forth the appropriate standard in the underlying statute, there is likewise no room for administrative interpretation when reviewing an agency's unambiguous regulation. Generally, agency interpretations of their own regulations are entitled to deference. *Christensen*, 529 U.S. at 588. *See Auer v. Robbins*, 519 U.S. 452, 117 S.Ct. 905, 137 L.Ed.2d 79 (1997). When faced with "a creature of the [agency's] own regulations, [its] interpretation of it is...controlling unless 'plainly erroneous or inconsistent with the regulation.'" *Auer v. Robbins*, 519 U.S. 452, 117 S.Ct. 905, 137 L.Ed.2d 79 (1997), quoting *Robertson v. Methow Valley Citizens Council*, 490 I.S. 332, 359 (1989). *Christensen* expands this doctrine: "*Auer* deference is warranted only when the language of the regulation is ambiguous." 529 U.S. at 588.

This court limited the amount of deference due agency interpretations of their own regulations by noting "*Auer* deference is warranted only when the language of the regulation is ambiguous." *Id.* In the face of a clear, unambiguous regulation, "[t]o defer to the agency's position would be to permit the agency, under the guise of interpreting a regulation, to create de facto a new regulation." *Id.*

Section 155.3 of Title 14 of the Code of Federal Regulations merely echoes the language of § 47153. As such, the standard purportedly interpreted in Order 5190.6A is not a creature of the FAA's regulations, but rather a creature of statute. Thus, the *Auer* principle does not apply in the present case. Additionally, the agency's interpretation of the standard contained in both the regulation and statute was both plainly erroneous and

inconsistent with that standard articulated in 49 U.S.C. § 47153 and 14 C.F.R. § 155.3.

Notwithstanding the inapplicability of *Auer* due to the standard being a creature of Congress, even if the standard were a creature of regulation, under *Christensen*, it was inappropriate for the FAA to interpret the standard set forth in the regulation because it was not ambiguous. At least one other circuit differs from the Eighth Circuit's decision on this point. *See Rhodes v. Johnson*, 153 F.3d 785 (7th Cir. 1998).

In *Rhodes v. Johnson*, 153 F.3d 785 (7th Cir. 1998), the Seventh Circuit reversed a Forest Service interpretation of its own Handbook (which was treated as a regulation because it was published in the Federal Register and had undergone notice and comment) because it contradicted the Handbook's plain language. Recognizing that the Supreme Court held that substantial deference is due an agency's interpretations of its own regulations, citing *Thomas Jefferson University v. Shalala*, 512 U.S. 504, 512 (1994), the Seventh Circuit nonetheless rejected the agency's interpretation. The court noted "the power of an agency to interpret its own regulations 'must not be confused with the power to rewrite.'" *Rhodes*, 153 F.3d at 789, quoting *Pettibone Corporation. v. United States*, 34 f. 3d 536, 541 (7th Cir. 1994). Further, the court noted that "[d]eference is not abdication, and it requires us to accept only those agency interpretations that are reasonable in light of the principles of construction courts normally employ." *Id.*, quoting *EEOC v. Arabian American Oil Company*, 499 U.S. 244, 260 (1991) (Scalia, J., concurring in part and concurring in judgment).

A year prior to deciding the present case, the Eighth Circuit itself refused to implicitly connect a statutory standard and the standard as applied by the National Park Service. *Sokol v. Kennedy*, 210 F.3d 876 (8th Cir. 2000).

In evaluating free-flowing rivers and their immediate environments for inclusion in the protection of the Wild and Scenic Rivers Act, Congress called for the identification of "outstandingly remarkable...values." *Id.* at 877. In practice, however, the National Park Service looked to identify "significant" and "important values", a standard it was more familiar with. *Id.* Four years after its initial determination and initial report, the National Park Service "explained that 'significant' and 'important' were being used merely as synonyms for 'outstandingly remarkable.'" *Id.* While the court recognized that the agency had some discretion in administering the statute, it was in the context of deciding "which boundaries would best protect and enhance the outstandingly remarkable values...but it must identify and seek to protect those values, and not some broader category." *Id.* at 879. The court concluded that the "post hoc re-definitions...were not sufficient to correct past errors upon which" the agency had taken action. Further, "significant" and "important" were not synonymous with the statutory standard of "outstandingly remarkable...values" but were "much broader terms." *Id.* at 880, 879.

Similarly, the standard applied by the FAA in deciding to release the City of Kansas City from its grant obligations was much broader than that designated by statute. The statute requires that the proposed action be necessary - that it be inevitable, or absolutely essential and indispensable - to the protection or advancement of civil aviation. To merely benefit civil aviation means that the action would simply be useful or helpful in protecting or advancing civil aviation. Such terminology implies that the proposed course of action is in fact dispensable, that civil aviation would continue and would indeed advance without the occurrence. Viewed in such light, the standard utilized by the FAA is clearly much broader than the "necessary to

advance...civil aviation interests" standard developed by Congress.

By connecting the statutory standard of § 47153 and the standard of Order 5190.6A, the Eighth Circuit contradicted its own decision in *Sokol*. Further, it acted in conflict with the law as applied by other circuits when reviewing the power of an administrative agency to interpret a statute it is entrusted to administer. In creating such an overreaching precedent, the Eighth Circuit allowed the FAA to take advantage of the discretion traditionally exercised by courts in permitting administrative interpretations of the law. Finally, the FAA abused its own discretion and power by acting well beyond the acceptable use of such discretion and expertise in administering a statute entrusted to it. By doing so, the FAA acted to, and the Eighth Circuit allowed, the detriment of the public trust.

CONCLUSION

The Eighth Circuit disregarded the clear precedent established by the Supreme Court in applying a level of deference akin to *Chevron* to FAA Order 5190.6A. By treating the Order as a reasonable interpretation of the standard set forth in 49 U.S.C. § 47153 and 14 C.F.R. § 155.3, and accepting the FAA's determination that a release from airport obligations would result in a "net benefit" to civil aviation, the court ignored the plain and unambiguous language of Congress. That language clearly demands that a release from assurances be *necessary* to advance or protect civil aviation interest.

Even if 49 U.S.C. § 47153 were ambiguous, the Order would only be entitled to respect, to the extent it had the power to persuade, per *Christensen* and *Skidmore*. There is no indication that Congress intended the FAA to act with the force of law in interpreting the statute. There is no express gap or silence in the statute left to fill, no ambiguity

to clarify, nor is there an express delegation of power to interpret the statute. Additionally, the Order was not promulgated under formal rule-making procedures, but was designed as internal guidance. Under both *Christensen* and *Skidmore*, internal guidelines are not entitled to deference, but merely respect to the extent they can persuade. Even under this standard, however, the Order fails. There is no persuasive power in the Order because it fails to create a discernible path relating the "necessary" standard set forth in the statute and regulation to the "net benefit" standard set forth in the Order.

Finally, as an internal interpretation of its own regulation, the Order fails to earn deference. First, the regulation merely repeats the standard created by Congress in § 47153, and is thus not a creature of the agency but of Congress. Second, even if the regulation were a creature of the FAA, the Order fails to earn deference because the regulatory standard is set forth in clear and unambiguous language in § 155.3.

Section 47153 of 49 U.S.C. and § 155.3 of 14 C.F.R. clearly and unambiguously demand that a release from airport obligations be necessary to advance or protect civil aviation. FAA Order 5190.6A purports to interpret these provisions in an internal guideline that was not subject to public notice and comment. The guideline does not explain how its standard of "net benefit" relates to the statutory standard of "necessary" to the advancement or protection of civil aviation, leaving it bereft of any power to persuade. The Order thus fails to earn any level of deference or respect. Accordingly, the Memorandum of Agreement releasing Richards-Gebaur Memorial Airport from its grant obligations, which is based principally upon the standard set forth in Order 5190.6A, is invalid.

If the Eighth Circuit's decision stands, a dangerous precedent will result, creating a slippery slope for agencies

to abuse their power and discretion by re-writing laws that clearly and unambiguously set forth the intent of Congress. Consequently, Respondent respectfully submits that the Petitioner's Petition for Writ of Certiorari should be granted.[2]

Respectfully submitted,

Law Offices of Yodice Associates
Kathleen A. Yodice
500 E. Street, S.W.
Suite 240
Washington, DC 20024
(202) 863-1000
Attorneys for Respondent, Aircraft Owners and Pilots Association

[2] Respondent Aircraft Owners and Pilots Association supports the Petition for Writ of Certiorari filed by Friends of Richards-Gebaur Airport and the arguments contained therein under Sup. Ct. R. 12.6. Respondent submits further grounds for granting the petition based on arguments presented to the Eighth Circuit in the same proceeding below. These arguments, however, are based on another part of the FAA's final decision, separate statutory authority, a separate regulation, and a separate internal agency order.

No. 01-949

In The
Supreme Court Of The United States

FRIENDS OF RICHARDS-GEBAUR AIRPORT,
Petitioner,

v.

FEDERAL AVIATION ADMINISTRATION, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

APPENDIX

TITLE 49 – Transportation
SUBTITLE VII – Aviation Programs
PART B – Airport Development and Noise
CHAPTER 471 –Airport Development
SUBCHAPTER II – Surplus Property for Public Airports

Sec. 47153. - Waiving and adding terms

(a) GENERAL AUTHORITY. -

(1) The Secretary of Transportation may waive, without charge, a term of a gift of an interest in property under this subchapter if the Secretary decides that -

(A) the property no longer serves the purpose for which it was given; or

(B) the waiver will not prevent carrying out the purpose for which the gift was made and is necessary to advance the civil aviation interests of the United States.

(2) The Secretary of Transportation shall waive a term under paragraph (1) of this subsection on terms the Secretary considers necessary to protect or advance the civil aviation interests of the United States.

(b) WAIVERS AND INCLUSION OF ADDITIONAL TERMS ON REQUEST. -

On request of the Secretary of Transportation or the Secretary of a military department, a department, agency, or instrumentality of the executive branch of the United States Government or a wholly owned Government corporation may waive a term required by section 47152 of this title or add another term if the appropriate Secretary decides it is necessary to protect or advance the interests of the United States in civil aviation or for national defense.

14 C.F.R. - CHAPTER I - PART 155

§ 155.3 Applicable law.

(a) Section 4 of the Act of October 1, 1949 (63 Stat. 700) authorizes the Administrator to grant the releases described in § 155.1, if he determines that --

(1) The property to which the release relates no longer serves the purpose for which it was made subject to the terms, conditions, reservations, or restrictions concerned; or

(2) The release will not prevent accomplishing the purpose for which the property was made subject to the terms, conditions, reservations, or restrictions, and is necessary to protect or advance the interests of the United States in civil aviation. In addition, section 4 of that Act authorizes the Administrator to grant the releases subject to terms and conditions that he considers necessary to protect or advance the interests of the United States in civil aviation.

(b) Section 2 of the Act of October 1, 1949 (63 Stat. 700) provides that the restrictions against using structures for industrial purposes in any instrument of disposal issued under section 13(g)(2)(A) of the Surplus Property Act of 1944, as amended (61 Stat. 678) are considered to be extinguished. In addition, section 2 authorizes the Administrator to issue any instruments of release or conveyance necessary to remove, of record, such a restriction, without monetary consideration to the United States.

(c) Section 68 of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2098) releases, remises, and quitclaims, to persons entitled thereto, all reserved rights of the United States in radioactive minerals in instruments of disposal of public or acquired lands. In addition, section 3

of the Act of October 1, 1949 (50 U.S.C. App. 1622b) authorizes the Administrator to issue instruments that he considers necessary to correct any instrument of disposal by which surplus property was transferred to a non-Federal public agency for airport purposes or to conform the transfer to the requirements of applicable law. Based on the laws cited in this paragraph, the Administrator issues appropriate instruments of correction upon the written request of persons entitled to ownership, occupancy, or use of the lands concerned.

Order 5190.6A
AIRPORTS COMPLIANCE HANDBOOK
10/1/89

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CHAPTER 7. RELEASE, MODIFICATION, REFORMATION OR AMENDMENT OF AIRPORTAGREEMENTS

SECTION 1. GENERAL GUIDANCE

7-1. AUTHORITY TO RELEASE, MODIFY, REFORM, OR AMEND.

a. The authority of the Administrator to release, modify, reform or amend all or part of any airport agreement and the legislative basis for such authority are discussed in Chapter 1, paragraph 5 of this Order.

b. The Administrator has delegated to regional Airports Division Managers full authority to take any action with respect to their functions and assigned responsibilities, subject only to the limitations set forth in Order 1100.5, FAA Organization-Regions and Centers, Chapter 2, Section 3.

7-2. GENERAL PRINCIPLES.

a. Within the specific authority conferred upon the Administrator by law, the FAA will, when requested, act to release, modify, reform or amend any airport agreement to the extent that such action will protect, advance, or benefit the public interest in civil aviation. Such action may involve only relief from specific limitations or covenants of an agreement or a complete and total release which authorizes a subsequent disposal of obligated airport property.

b. Any property, when described as part of an airport in an agreement with the United States or defined by an ALP, is considered to be "dedicated" or obligated for airport purposes by the terms of the agreement. If any of the

property so dedicated is not needed for present or future airport purposes, an amendment to or release from the agreement may be granted in accordance with the guidance contained in this Chapter. The omission of an airport from the NPIAS is not to be construed as a determination by the FAA that such airport has ceased to be needed for present or future airport purposes.

c. A decision to release, modify, reform, or amend an airport agreement will be based on the guidelines outlined in paragraphs 7-37a and b below and on the specific factors pertinent to the type of agreement as detailed in the following sections of this Chapter. However, any release which has the effect of permitting the abandonment, sale, or disposal of a complete airport (whether or not such action contemplates the development of a replacement airport facility) must be referred to AAS-1 for ARP-1 approval (see Order 1100.5, Chapter 2, Section 3, paragraph 222h(15)).

7-3.-7-5. RESERVED.

SECTION 2. SURPLUS PROPERTY AGREEMENTS

***

7-8. RELEASE FOR SALE OR DISPOSAL.

a. General Policy. A total release, permitting the sale and disposal of real property acquired for airport purposes under the Surplus Property Act, shall not be granted unless it can clearly be shown that the sale of such property will benefit civil aviation.

(1) If any such property is no longer needed to directly support an airport purpose or activity (including the generation of revenue for the airport), it may be released for sale or disposal upon a demonstration that such disposal will produce an equal or greater benefit (to the airport or another public airport) than the continued retention of the land. Such a release has the effect of authorizing the

conversion of a real property asset into another form of asset (cash or physical improvements) which better serves the purpose for which the real property was initially conveyed. This objective is not met unless an amount equal to the net sale proceeds based on the current FMV of the property is realized as a consequence of the release and such amount is committed to airport purposes.

(2) In cases where an airport has a large amount of revenue production property that has remained undeveloped due to the lack of demand for this kind of property and where there appears to be no prospect for future development, FAA should fully evaluate the merits of either reversion or complete release for sale. This must be coordinated with AAS-300.

***

SECTION 5. PROCEDURES

7-37. FAA ACTION ON OWNER REQUESTS.

a. Evaluation. When a request has been received, supported by the appropriate documentation and exhibits, an evaluation of the total effect of the owner's proposal shall be made. This evaluation shall be based on the general policy stated in paragraph 7-2 and shall include consideration of pertinent factors such as:

(1) The past and present owner's compliance record under all its airport agreements and its actions to make available a safe and usable airport for maximum aeronautical use by the public; and evidence that the owner has taken or agreed to take all actions possible to correct noncompliance situations at the airport, if applicable.

(2) The reasonableness and practicality of the owner's request in terms of aeronautical facilities which are needed and the priority of the need.

(3) The net benefit to be derived by civil aviation and the compatibility of the proposal with the needs of civil aviation.

(4) Consistency with the guidelines for specific types of releases as discussed in this Chapter.

b. Determinations. The FAA will not release more than that which the owner requests. The decision to grant or deny the request, based on the above evaluation factors, must be guided by the statutes, regulations and policy applicable to the specific types of agreements involved. In addition, it must be determined if an environmental assessment is required under Order 5050.4, Airport Environmental Handbook. Further, it must be determined that either:

(1) The public purpose for which a term, condition, or covenant of an agreement, or the agreement itself, was intended to serve is no longer applicable, or

(2) The release, modification, reformation or amendment of an applicable agreement will not prevent accomplishment of the public purposes for which the airport or its facilities were obligated, and such action is necessary to protect or advance the interest of the United States in civil aviation, or

(3) The release, modification, reformation or amendment will obligate the airport owner under new terms, conditions, covenants, reservations or restrictions determined necessary in the public interest and to advance the interests of the United States in civil aviation, or

(4) The release, modification, reformation or amendment will conform the rights and obligations of the owner to the statutes of the United States and the intent of the Congress consistent with applicable law.

***

[DATE STAMPED DEC 29 1999]
[LOGO]

U.S. Department
of Transportation

Federal Aviation
Administration

Office of the Associate
Administrator for Airports

800 Independence Avenue, S.W.
Washington, D.C. 20591

[DATE STAMPED DEC 23 1999]

Mr. Russell Widmar
Director of Aviation
City of Kansas City, Missouri
601 Brasilia Avenue
Kansas City, MO 64153

Dear Mr. Widmar:

Re: Richards-Gebaur Memorial Airport
Release of Certain Federal Obligations

In letters dated September 26, 1997, December 5, 1997, and December 21, 1999, the City of Kansas City, Missouri, requested that the Federal Aviation Administration (FAA) release the City from its obligations under the Surplus Property Act of 1944 to maintain the surplus property constituting certain parcels at the Richards-Gebaur Memorial Airport for aeronautical use, and from its obligations under Federal grant agreements to make the airport available to the public for aeronautical use.

The requested release would enable the City to close the Richards-Gebaur Memorial Airport in order to use the subject parcels, which comprise airfield and landside portions of the existing airport, as non-aeronautical, revenue-producing airport property of the Kansas City Aviation Department. Specifically, the two parcels would be used as an intermodal railport facility and related activities. The subject parcels are identified as Phase 1 and Phase 2 parcels in draft leases of the property, dated November 18, 1999, from the City to the Kansas City Port Authority and from the Kansas City Port Authority to the Kansas City Southern Railroad respectively, and a draft development agreement dated November 8, 1999.

In a Memorandum of Agreement (MOA) dated July 14, 1998, the City and the FAA agreed on the conditions required for a release of the Richards-Gebaur property on terms that represented a net benefit to civil aviation in the Kansas City region. (Attachment 1). The terms of the proposed leases of property to the Kansas City Port Authority and the Kansas City Southern Railroad submitted to the FAA on November 15 were substantially revised from earlier drafts in order to meet the requirements of the MOA.

In a letter to FAA Administrator Jane Garvey dated August 6, 1999, Mayor Kay Barnes advised the FAA of the City's intent to proceed with planning for a new replacement general aviation airport on or in the vicinity of the Richards-Gebaur site, and to make every effort to achieve this goal. In consideration of the changed circumstances involved in the potential development of a replacement airfield, the FAA and the City negotiated an Amended and Restated Memorandum of Agreement (Amended MOA) to reflect the terms that would apply during the planning for a replacement airport. The FAA and the City have agreed to the terms and provisions stated in the Amended MOA

attached to this Release. (Attachment 2). The Amended MOA will be executed only after a City Council ordinance approving the document has been adopted and has taken effect. The City has assured the FAA that the Amended MOA will be submitted for City Council approval at the next formal meeting of the City Council following the issuance of this Release.

By letter of December 18, 1999, the FAA advised the City that the terms of the draft leases dated November 15 and the development agreement dated November 8 were consistent with the Amended MOA, subject to confirmation that the City agreed with certain specific interpretations of the City's obligations under the leases. In a letter dated December 17, counsel for the City affirmed the City's concurrence with the FAA's interpretation of the leases and development agreement. (Attachment 3). The 1998 MOA is essentially identical to the Amended MOA with respect to requirements for the lease of parcels of the Richards-Gebaur property, and the leases are, therefore, also consistent with the 1998 MOA.

By letter dated December 21, 1999 (Attachment 4), the City requested that the FAA issue the release of the airport effective January 1, 2000, based on the July 1998 MOA and in advance of the execution of the Amended MOA. The City made this request based on its interest in leasing the airport property to the Kansas City Southern Railroad on January 1 to meet certain construction and occupancy goals for the planned development of the Phase 1 and Phase 2 parcels. In recognition that the FAA and the City had negotiated amendments to the MOA that had not yet been executed, the City made certain commitments in this letter regarding approval and execution of the Amended MOA and the City's efforts to proceed with planning for a new airport on the Richards-Gebaur site.

In summary, as of the date of this most recent request from the City, there is an MOA in effect between the FAA and the City for the terms of a release of the Richards-Gebaur property, and the FAA has determined that the City's proposed lease of the property is consistent with the terms of this MOA. While the City has committed to proceeding with approval of the Amended MOA, and the FAA expects the City to fulfill this commitment, there is no legal impediment to issuance of a release at this time.

Accordingly, subject to the conditions, reservations, and stipulations contained in Attachments 1, 3, and 4, the City is hereby released from its obligations to maintain the Richards-Gebaur Memorial Airport property for aeronautical use. The property remains part of the Kansas City Airports System owned and operated by the Kansas City Department of Aviation, and remains subject to the obligations of the Surplus Property Act of 1944 and Federal grant agreements to the extent those obligations do not require that the property be used as a public use airport. The release does not preclude reclassification of the property, other than the Phase 1 and Phase 2 parcels described above, for aeronautical use if the City requires the property for a replacement general aviation airport on the site.

Sincerely,

/s/ Paul L. Galis
for: Louise E. Maillett
Acting Administrator
for Airports

Enclosures